

REMARKS

Applicants respectfully solicit favorable reconsideration.

Claims 17-22 and 45-72 are presented. In claim 17 and new claim 53 the superfluous word "of" between "is" and "from" has been deleted pursuant to the Examiner's constructive suggestion. Claims 45-66 replace former claims 24-44 to correct an oversight in claim numbering, such as two claims numbered 33). New claims 67-72 find support in the original specification at page 6, lines 22-31 and page 8, lines 28-31.

Applicants present amendments to their specification to address the Examiner's objection. See Office Action, page 2, paragraph 1. The well-known European-style punctuation has been amended to U.S. form.

Applicants assume the paragraph 3 (Office Action, page 2) was crossed-out by the Examiner. If this understanding is mistaken, please advise.

The attached PTO form lists U.S. Patent No. 4,645,674, U.S. Patent No. 4,738,865, and U.S. Patent No. 6,294,208. Two of the three documents were previously cited in the ISR that Applicants disclosed to the Examiner when they filed their present 371 National Stage application. U.S. Patent No. 6,208,294 was brought to the attention of the undersigned within the last 30 days. Upon investigation, it appears that U.S. Patent No. 6,208,294 is listed as withdrawn on the USPTO web site, and a copy was located and is enclosed as a courtesy to the Examiner. It is not clear whether a petition fee is due, but if one is, then such fee can be charged to our Deposit Account No. 06-1135, regarding Order No. 7392/84241.

1. Applicants submit claims 17-23, 25, 32-36, 38 and 41 each defines a novel invention. Applicants courteously request the Examiner to reconsider and withdraw the anticipation rejection under 35 U.S.C. §102(b) over Budd (U.S. Patent No. 4,910,031).

The Budd reference simply does not anticipate, and Applicants courteously request consideration and withdrawal of the rejection, including reliance on alleged “inherency.”

It is courteously suggested that the anticipation rejection misapplies the inherency doctrine. According to the Manual Patent Examining Procedure (MPEP), Section 2112, page 2100-57:

The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. *In re Rijckaert*, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993) (reversed rejection because inherency was based on what would result due to optimization of conditions, not what was necessarily present in the prior art); *In re Oelrich*, 666 F.2d 578, 581-82, 212 USPQ 323, 326 (CCPA 1981). “To establish inherency, the extrinsic evidence ‘must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.’” *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999) (citations omitted).

And, the MPEP additionally instructs:

“In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art.” *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original)...

Id.

Applicants respectfully submit all claims are novel over the Budd reference. To illustrate their portion, Applicants offer these exemplary points:

(a) As to independent claims 17 and 32, the Office Action relies on the opinion that “the weight ratio of binder to co-binder would be an inherent experimentally result [sic] variable in order to achieve a ratio that would effectively reduce topping rub-off.”

This is conjecture lacks support in the reference. The conjecture is self-defeating because the alleged weight ratio is by definition a “variable” and by common understanding a variable varies.

Applicants respectfully solicit an Examiner’s Affidavit if this rejection is not withdrawn.

(b) As to independent claims 17 and 32, the Office Action recites “[i]t is well known in the art that granules typically have a size greater than 0.5mm as instantly claimed.”

This asserted “fact” lacks basis in the Budd reference; and it is not inherent.

In fact, prior art discloses particle sizes on the order 50 μm (Kitano reference), (70-100 μm) (Kitano reference), 110 μm to 140 μm (Kitano, Examples 3 and 6).

Therefore, the Budd reference does not necessarily, always, describe toppings having sizes greater than 0.5 mm.

(c) As to dependent claims 18 and 33, the Office Action appears to offer a theory based on Budd (Col. 2, lines 18-24) that “[i]t is inherent that the food product was dried prior to the addition of the binder composition in order to provide a complete protective barrier to further promote adhesion of the topping material.”

The passages relied upon in the Office Action say nothing about drying.

The Budd reference has no disclosure of drying steps at col. 4, line 58 to col. 5, line 3.

The Budd reference presents Examples I, II, III, IV, and V (col. 5 to col. 7) but none refer to an affirmative drying step before applying a binder composition.

The rejection is also inconsistent with the rejection as applied to claims 17 and 32.

There is no “inherent” disclosure in Budd that appears to support the rejection of claims 18 and 33.

(d) As to dependent claims 22 and 36, “Budd is silent as to deep frying after extruding the products.” This is conceded in the Office Action.

A reference that has is silent regarding an alleged teaching of a claimed element of the invention would not have suggested the claimed invention to a person of only ordinary skill in the art. Ex parte Brown, 19 USPQ2d 1609, 1612 (BOPI 1990) (“since the prior art is silent as to this feature, we are unable to sustain the rejection which we originally precipitated.”). When an alleged prior art patent, including drawings, is silent on a quantitative relationship, rejections assuming the existence of any such quantitative relationship are undermined, and subject to being reversed. *See, e.g., Hockerson-Halberstadt Inc. v. Avia Group International Inc.*, 58 USPQ2d (BNA) 1487, 1491 (Fed.

Cir. 2000); Ex parte Brown, *supra*; Ex parte Isaksen 23 USPQ2d (BNA) 1001, 1006 (BOPI 2001) ("Forbes patent are completely silent as to any sharpening effect and do not describe with any specificity what results to magnetic treatment had on the razor blade edge," rejection reversed).

Applicants respectfully submit the Office Action, however, overlooks the silence with the mistaken reliance on an assertion that "[i]t is inherent ..." Claims 22 and 36 define novel inventions. It appears no facts are adduced to support the asserted inherency.

The Budd reference does not anticipate claims 22 and 36, as there is no inherency and thus no anticipation.

Applicants respectfully request the Examiner to reconsider and withdraw the rejection as to claims 22 and 36.

(e) As to dependent claims 25 and 38, these dependent claims are novel, and merely deciding to choose an ingredient, and then pick through a document to identify it, - the Budd reference (col. 3, lines 35-39), is neither inherency nor anticipation. The claims are novel, including for the reasons discussed herein as to their respective independent claims.

(f) The Budd reference does not appear to describe food products at column 1, lines 42-50 as inherently having water content less than 5 %. Claims 19-21, 28, 33-35 and 41 are novel over the Budd reference.

(g) As to independent claim 32, the Budd reference does not inherently disclose the maltodextrin of the specified DE as a binder. It seems to be the case that the Budd reference does not disclose the combination of steps (a) and (b), followed by (c) as such steps are recited in claim 32. Attention is invited to Budd Examples I-V submitted. Example I does not describe claim 32. Example II is inconsistent with even step (a) in claim 32 since the toppings are applied after a binder is applied. Example III is no better. Example IV does not disclose the steps recited in claim 32.

(h) The Examiner's attention is also respectfully directed to the International Preliminary Examination Report, copy of record herein, because an internationally recognized search and examination authority reported to the U.S. PTO that Applicants' claimed inventions are novel, have inventive step (*i.e.*, would not have been obvious) and satisfy the utility requirement.

**INTERNATIONAL PRELIMINARY
EXAMINATION REPORT**

International application No. PCT/NL 03/00552

V. Reasoned statement under Article 35(2) with regard to novelty, inventive step or industrial applicability; citations and explanations supporting such statement

1. Statement

Novelty (N)	Yes: Claims	1-15
	No: Claims	
Inventive step (IS)	Yes: Claims	1-15
	No: Claims	
Industrial applicability (IA)	Yes: Claims	1-15
	No: Claims	

2. Citations and explanations

see separate sheet

2. Applicants courteously submit claims 24, 26-27, 29-31, 37, 39-40, and 42-44 each defines an unobvious invention over the prior art. Applicants respectfully request the Examiner to reconsider and withdraw the rejection of these claims over the Budd reference when taken in view of Luft (U.S. Patent No. 3,830,941), Keller (U.S. Patent No. 4,880,653), and Kitano et al. (U.S. Patent No. 6,902,752).

The Budd reference is inadequate as discussed above, and the secondary references reflect hindsight-guided picking and choosing, whereby it is submitted that the rejection founders.

A rejection cannot be predicated on the mere identification of individual components of claimed limitations. There must be evidence that "a skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner claimed." In re Rouffet, 149 F.3d 1350, 1357 (Fed. Cir. 1998); see also In re Werner Kotzab, 217 F.3d 1365, 1371 (Fed. Cir. 2000). That is, "[t]he mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification" Ex parte Metcalf, 67 USPQ2d 1633, 1635 (BOPI 2003), quoting in re Fritch, 972 F.2d 1260, 1266 (Fed. Cir. 1992). "[I]t is incumbent upon the examiner to identify some suggestion to combine the references or make the modification." Ex parte Askman, Appeal No. 96-1548 (June 10, 1999) at page 5, quoting In re Mayne, 104 F.3d 1339, 1342 (Fed. Cir. 1997). The factual basis for an alleged suggestion "cannot 'be resolved on subjective belief and unknown authority.'" Ex parte Metcalf, 67 USPQ2d at 1635, quoting In re Lee, 277 F.3d 1338, 1343-44 (Fed. Cir. 2002).

The Luft et al. reference is seemingly largely irrelevant. It would not have been combined with the Budd reference, and it would not have motivated a person of ordinary skill in the art towards the present invention. The Luft et al. reference does not relate to the technical problem associated with the use of seasonings having a relatively large particle size, in particular a size greater than 0.5 mm. In contrast, Luft et al. addresses the problem that arises with the commonly used sugar solutions employed in coating processes. In particular, sugar solutions are not compatible with flavours such as onion, garlic, cheese and the like (cf. column 1, lines 21-34). The solution provided by Luft et al. is to replace the sugar solution with a starch hydrolysate having a relatively low dextrose equivalent value (cf. column 1, lines 44-71), but that does not address the shortcomings in the Budd reference, nor would it have suggested the present inventions.

The Keller et al. reference would not have been combined with the Budd reference, nor with the Luft et al. reference. The Keller et al. reference seems essentially irrelevant as far as the present inventions are concerned. The Keller et al. reference discloses a continuous process for the preparation of pretzels and addresses the energy inefficiency of prior art processes. The process according to Keller et al. involves feeding a dry mixture of flour, corn syrup, corn syrup solids and salt to an extruder, injecting water, extruding the moistened mixture through a die so as to form a continuous ribbon of extrudate, coating said continuous ribbon of extrudate with a sodium hydroxide solution and baking the extrudate. The dry mixture may include conventional pretzel flavouring agents (cf. column 4, line 64 – column 5, line 5). Additionally, *prior* to baking, the extrudate may be salted with pretzel salt (cf. column 6, lines 47-52). Furthermore, *after* baking the ribbons may be filled with *e.g.* a creamy or paste-like

material (cf. column 6, line 66 – column 7, line 2). However, Keller et al. does not relate to applying a coating comprising seasonings having a relatively large particle size to the pretzel *after* the baking step.

The above-distinguished references – alone or in combination- would not have been combined with the Kitano et al. reference. Even if, *arguendo*, they were all combined, the Kitano et al. reference would not overcome the cumulative shortcomings of the other references. The coating material according to Kitano et al. comprises as main components an oil and a fat which contains coarse particles of a solid component other than oil or fat, said coarse particles having a size of 50 μm (=0.05 mm) to 1 mm (cf. claim 1 and column 3, lines 58-59). Instead of or in addition to the solid component, the coating material may comprise sugar granules having a size of 50 μm (=0.05 mm) to 1 mm (cf. column 2, lines 7-11; column 3, lines 31-38). Examples 1, 2, 4 and 5 of Kitano et al. disclose powdered sugar having a particle size of 70-100 μm (= 0.07 - 0.10 mm) whereas Examples 3 and 6 disclose trehalose having a particle size of 110 – 140 μm (= 0.11 – 0.14 mm). Kitano further expressly discloses that if the particle size is lower than 50 μm , the eating feeling becomes less crispy and if oil, fat and sugar are present next to the solid component, transparency of the coating is a problem (cf. column 2, lines 28-32 and Comparative Example 1). Moreover, if the size of the solid component exceeds 1 mm, the dispersity of the sugar in the oil and fat is reduced. Consequently, Kitano et al. does not address the problem associated with the use of seasonings having a relatively large particle size, in particular having a particles size over 0.5 mm. Additionally, although the range for the particle size disclosed in Kitano et al. might fortuitously overlap with a range recited in a claim, the larger part of Kitano's range is well below the

lower limit claimed. More importantly, Kitano does not provide, nor would it have suggested, a solution for preventing particles having a size over 0.5 mm from coming off of the food product (cf. also the Examples where the maximum particle size is only 0.14 mm).

3. Conclusion

Applicants respectfully request favorable reconsideration followed by Notice of Allowance.

If the Examiner has any questions, please contact Applicants' legal representative.

Respectfully submitted,

Fitch, Even, Tabin & Flannery



Kendrew H. Colton
Registration No. 30,368

Date: September 7, 2006

OFFICIAL CORRESPONDENCE TO
Customer No. 42798

FITCH, EVEN, TABIN & FLANNERY
1801 K Street, NW, Suite 401L
Washington, DC 20006-1201
Tel: (202) 419-7000
Fax: (202) 419-7007